

ANN BAVENDER*
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
RICHARD J. ESTEVEZ
PAUL J. FELDMAN
ROBERT N. FELGAR*
ERIC FISHMAN
RICHARD HILDRETH
FRANK R. JAZZO
ANDREW S. KERSTING
EUGENE M. LAWSON, JR.
HARRY C. MARTIN
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY
HOWARD M. WEISS
* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FRANK U. FLETCHER
(1939-1985)
ROBERT L. HEALD
(1956-1983)
PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)
RUSSELL ROWELL
(1948-1977)

RETIRED
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*
MITCHELL LAZARUS*
EDWARD S. O'NEILL*
JOHN JOSEPH SMITH

WRITER'S DIRECT

812-0474

kersting@fhh-telcomlaw.com

October 22, 1998

BY HAND DELIVERY

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

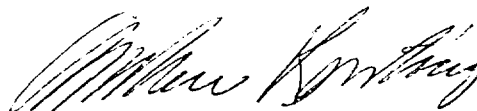
Re: Reply to Consolidated Opposition to
Applications for Review
MM Docket Nos. 97-26 and 97-91
(Detroit, Howe and Jacksboro, Texas, and
Antlers and Hugo, Oklahoma, et al.)

Dear Ms. Salas:

Transmitted herewith on behalf of Metro Broadcasters-Texas, Inc., are an original and four copies of its "Reply to Consolidated Opposition to Applications for Review," filed in the above-referenced proceeding. This pleading is being filed in connection with the Commission's *Report and Order*, DA 98-1650 (released August 21, 1998).

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting
Counsel for Metro Broadcasters-Texas, Inc.

Enclosure

cc (w/ encl.): Certificate of Service (by hand & first-class mail)

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-26
Table of Allotments,)	RM-8968
FM Broadcast Stations,)	RM-9089
(Detroit, Howe and Jacksboro, Texas,)	RM-9090
Antlers and Hugo, Oklahoma))	
)	
In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-91
Table of Allotments,)	RM-8854
FM Broadcast Stations,)	RM-9221
(Lewisville, Gainesville, Robinson,)	
Corsicana, Jacksboro, and)	
Mineral Wells, Texas))	
To: The Commission		

REPLY TO
CONSOLIDATED OPPOSITION TO APPLICATIONS FOR REVIEW

Metro Broadcasters-Texas, Inc. ("Metro"), licensee of Station KHYI(FM), Howe, Texas, by counsel and pursuant to Section 1.115 of the Commission's rules, hereby replies to the "Consolidated Opposition to Applications for Review," filed October 9, 1998 ("Opposition"), by Heftel Broadcasting Corporation ("Heftel"). In support of this reply, the following is stated:¹

¹ Due to the page limitation governing reply pleadings, which is contained in Section 1.115(f) of the rules, Metro's reply will address only certain matters raised in Heftel's Opposition. Metro's silence regarding other matters should not be deemed to be acquiescence. Instead, Metro believes such matters either are immaterial to the resolution of this proceeding or have been adequately addressed in Metro's Application for Review, filed September 24, 1998.

Heftel's primary argument in response to Metro's Application for Review is contained at pages 13-20 of its Opposition. Heftel acknowledges that the cases cited ("Cited Cases") by Metro and Jerry Snyder and Associates, Inc. ("Snyder"), in their respective Applications for Review stand for the proposition for which they have been cited, *i.e.*, that the Commission will dismiss a petition for rulemaking which proposes to delete an existing but vacant allotment if, prior to the initial comment deadline, an applicant expresses an interest in the allotment by filing an application for the subject facility. Nevertheless, Heftel claims that the facts in this proceeding are distinguishable from those in the Cited Cases because (i) the construction permit for Channel 240C1 at Mineral Wells expired in December 1994; (ii) Heftel filed its rulemaking petition 19 months later, on July 26, 1996; and (iii) Snyder did not file the subject application to implement the Class C1 upgrade (the "Snyder Application") until November 25, 1996. *See* Opposition, pp. 14-15.

Heftel's argument is without merit. In *Driscoll, Gregory and Robstown, Texas*, 9 FCC Rcd 3580 (Allocations Branch 1994) (NPRM), a rulemaking petitioner sought to substitute Channel 283C3 for Channel 286A at Robstown, the reallocation of Channel 283C3 from Robstown to Driscoll, which would have provided Driscoll with its first local aural transmission service, and the modification of the station license to specify Driscoll as its community of license.² In support of its proposal to delete the allotment of Channel 283A at Gregory, the petitioner noted that the channel had been allotted in 1988, and the only construction permit for that facility had been cancelled on December 16, 1992. *Id.* at 3580, and n.3. Although the Allocations Branch ("Branch") proposed to delete Channel 283A at Gregory in order to accommodate the petitioner's proposal, it also stated:

² The petitioner also claimed that the requested reallocation and upgrade of Station KMIZ-FM at Driscoll would result in an increase of 443% in population served and a 284% increase in 60 dBu land area served. *Id.* at 3580, n.2.

. . . [T]he Commission does not delete a channel where an expression of interest is demonstrated by the filing of an application. Therefore, should the Commission receive an acceptable application by the initial comment deadline . . . , petitioner's proposal to delete Channel 283A at Gregory may be dismissed.

Id. at 3580.

Just as in this case, *Driscoll* involved a request to delete a channel where a construction permit for that facility had expired long before the Branch issued its NPRM. Nevertheless, consistent with Commission precedent, the Branch made clear that the petitioner's proposal would be dismissed if a party expressed an interest in the subject facility by filing an application prior to the initial comment deadline. Therefore, Hefel's claim that this proceeding is factually distinguishable from the Cited Cases due to the cancellation of the Channel 240C1 permit and the delay in filing the Snyder Application is without merit. *See also Galesburg, Illinois and Ottumwa, Iowa*, DA 98-2068, ¶¶3, 5 (released October 16, 1998).³

Hefel's argument that the Cited Cases are inconsistent with Section 73.208(a)(3)(iii) of the Commission's rules is equally unavailing. The cut-off procedures established in *Conflicts*⁴ were designed to prevent FM applications from being subject to subsequently-filed rulemaking petitions

³ In *Galesburg*, a construction permit for an upgrade from Channel 224A to Channel 224C3 expired on August 26, 1992, and was cancelled on November 18, 1992. Nevertheless, the Branch stated that the Class C3 upgrade was final, was protected in the Commission's data base, and, despite the cancellation of the C3 permit nearly six years ago, there was nothing to prevent the licensee of the currently-operating Class A station from filing a minor change application to implement the Class C3 license modification. *Id.* at ¶5.

⁴ *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. granted in part and denied in part*, 8 FCC Rcd 4743 (1993) ("*Conflicts*").

that involve a short-spacing conflict with the transmitter site specified in the pending application.⁵

Indeed, Heftel missed the operative language in Section 73.208(a)(3) of the rules:

(3) Petitions to amend the Table of Allotments that do not meet minimum distance separation requirements to *transmitter sites specified in pending applications* will not be considered unless they are filed no later than:

* * * * *

(iii) The date of receipt of all other types of FM applications.

47 CFR §73.208(a)(3)(iii) (emphasis added). Despite Heftel's contentions, *Conflicts* did not eliminate the independent requirement that rulemaking petitions must protect the reference coordinates of an existing allotment.⁶ Therefore, there is no basis for Heftel's argument that the Commission's decision in *Conflicts* requires the Commission to conduct a comparative analysis of the public interest benefits allegedly provided by the various proposals in this proceeding.⁷

Finally, the Commission's policy of requiring a rulemaking petitioner to protect an existing FM allotment does not violate Section 307(b) of the Act. It is well established that the Commission has the authority to adopt procedural cut-off rules in order to promote the goals of administrative orderliness and finality. *See Conflicts*, 8 FCC Rcd at 4744, ¶12, citing *Ashbacker Radio Corp. v.*

⁵ See 7 FCC Rcd 4917 at ¶2. After noting the increasing difficulty faced by FM applicants in seeking to locate new transmitter sites, the Commission stated: "Given the time and effort required by FM applicants to secure new transmitter sites, we believe that FM applicants should be afforded some form of cut-off protection from subsequently filed rulemaking proposals." 7 FCC Rcd at 4919, ¶ 9. *See also* 8 FCC Rcd 4743, n.2 (reconsideration order).

⁶ See 47 CFR §73.208(a)(1)(ii).

⁷ Although Heftel repeatedly alleges that its proposal would bring an additional service to more than three million people (*see, e.g.,* Opposition, pp. 4, 19), Heftel fails to note that the vast majority of these people reside in the Dallas-Ft. Worth metroplex, which already is well-served by a plethora of radio stations.

FCC, 326 U.S. 327 (1945). Without such rules, the Commission could not process and grant either applications or rulemaking petitions. Accordingly, the Commission's case law recognizes that Section 307(b) is not violated if a rulemaking petition or counterproposal is dismissed because it was submitted after a filing deadline, even though the petition or counterproposal might otherwise prevail on its merits over the other timely-filed proposals in the proceeding.⁸ *Id.* at 4745, ¶12, citing *Pinewood, North Carolina*, 5 FCC Rcd 7609, 7610 (1990).

In this case, the Commission previously made a public interest determination that Channel 240C1 should be allotted to Mineral Wells because it would provide the community with an expanded coverage area FM service. *Mineral Wells and Winters, Texas*, 7 FCC Rcd 1791 (Allocations Branch 1992).⁹ Therefore, consistent with the Commission's procedural rules, Heftel is not entitled to a comparative analysis of its proposal *vis-a-vis* the Snyder Application because its rulemaking petition was filed long after the initial comment deadline in the *Mineral Wells* proceeding.

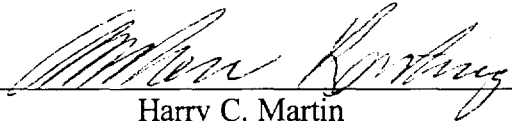
WHEREFORE, in light of the foregoing, Metro Broadcasters-Texas, Inc. respectfully requests that its Application for Review, filed September 24, 1998, be GRANTED, and the "Consolidated Opposition to Applications for Review," filed October 9, 1998, by Heftel Broadcasting Corporation, be DENIED.

⁸ Heftel itself acknowledges that the Commission may adopt administrative regulations containing filing deadlines to allow for the orderly processing of rulemaking petitions and applications. *See* Opposition, p. 20.

⁹ The allotment became effective on April 20, 1992. *See* 57 *Fed. Reg.* 8580 (March 11, 1992).

Respectfully submitted,

METRO BROADCASTERS-TEXAS, INC.

By: 
Harry C. Martin
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.
1300 North Seventeenth Street
11th Floor
Arlington, Virginia 22209
(703) 812-0400

October 22, 1998

c:\ask...martin\rm\lewis.rep

CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 22nd day of October, 1998, copies of the foregoing "Reply to Consolidated Opposition to Applications for Review," were hand delivered or mailed first-class, postage pre-paid, to the following:

Andrew J. Rhodes*
Special Legal Advisor
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 536
Washington, DC 20554

John A. Karousos, Chief*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 565
Washington, DC 20554

Ms. Kathleen Scheuerle*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 565
Washington, DC 20554

Mr. Dale Bickel*
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 332
Washington, DC 20554

Roy R. Russo, Esquire
Lawrence N. Cohn, Esquire
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, DC 20036
Counsel for Heftel Broadcasting Corporation

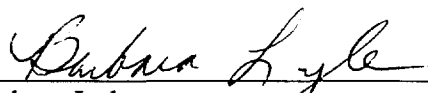
Mark N. Lipp, Esquire
Shook Hardy & Bacon
Suite 600
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
Counsel for Hunt Broadcasting, Inc.

Robert Healy, Esquire
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, DC 20036
Counsel for Jerry Snyder and Associates, Inc.

Erwin G. Krasnow, Esquire
Verner, Liipfert, Bernhard,
McPherson & Hand, Chartered
901 15th Street, N.W., Suite 700
Washington, DC 20005
Counsel for Graham Newspapers, Inc.

William J. Pennington, Esquire
P.O. Box 403
Westfield, Massachusetts 10186
Counsel for Great Plains Radiocasting

John F. Garziglia, Esquire
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, DC 20006
Counsel for K95.5, Inc.


Barbara Lyle

* Hand Delivered